

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1978

No.

78-1114

Supreme Court, U. S.

FILED

JAN 15 1979

MICHAEL RODAK, JR., CLERK

SECRETARY OF COMMERCE OF THE UNITED STATES

LOS ANGELES COUNTY, a body corporate and politic;
LOS ANGELES COUNTY BOARD OF SUPERVISORS;
LOS ANGELES COUNTY FLOOD CONTROL DISTRICT;
LOS ANGELES COUNTY ENGINEER; FACILITIES
DEPARTMENT OF LOS ANGELES COUNTY;

Appellants,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA,
a nonprofit corporation; ENGINEERING CONTRACTORS
ASSOCIATION, a nonprofit corporation; AMERICAN SUB-
CONTRACTORS ASSOCIATION, a nonprofit corporation;
LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL
CONTRACTORS ASSOCIATION, INC., a nonprofit corporation;
STEVE P. RADOS, INC., a corporation; GRIFFITH COMPANY,
a corporation; GORDON H. BALL, INC., a corporation;
STODDARD ENTERPRISES, a sole proprietorship; and
GRANITE CONSTRUCTION COMPANY, a corporation,

Appellees.

Appeal From the United States District Court
Central District of California

JURISDICTIONAL STATEMENT

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SUPERVISORS; LOS ANGELES COUNTY
ENGINEER; FACILITIES DEPARTMENT
OF LOS ANGELES COUNTY

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DEPARTMENT OF COMMERCE; U.S. DEPARTMENT OF
COMMERCE; LOS ANGELES COUNTY, a body corporate
and politic; LOS ANGELES COUNTY BOARD OF SUPERVISORS;
LOS ANGELES COUNTY FLOOD CONTROL DISTRICT;
LOS ANGELES COUNTY ENGINEER; FACILITIES
DEPARTMENT OF LOS ANGELES COUNTY; CITY OF
LOS ANGELES, a municipal corporation; LOS ANGELES
CITY COUNCIL; DEPARTMENT OF RECREATION AND
PARKS OF THE CITY OF LOS ANGELES; DEPARTMENT
OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,

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U.S. DEPARTMENT OF COMMERCE;
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SUPERVISORS; LOS ANGELES COUNTY FLOOD
CONTROL DISTRICT; LOS ANGELES COUNTY
ENGINEER; FACILITIES DEPARTMENT OF
LOS ANGELES COUNTY; CITY OF LOS ANGELES,
a municipal corporation; LOS ANGELES CITY
COUNCIL; DEPARTMENT OF RECREATION AND
PARKS OF THE CITY OF LOS ANGELES;
DEPARTMENT OF PUBLIC WORKS OF THE
CITY OF LOS ANGELES,

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ASSOCIATION, a nonprofit corporation; LOS
ANGELES COUNTY CHAPTER, NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION, INC.,
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a corporation; GRIFFITH COMPANY, a corporation;
GORDON H. BALL, INC., a corporation;
STODDARD ENTERPRISES, a sole proprietorship;
and GRANITE CONSTRUCTION COMPANY,
a corporation,

Appellees.

JURISDICTIONAL STATEMENT

1.

OPINION BELOW

The district court, on October 20, 1978,
filed its memorandum opinion and order, which
are not yet reported. Several other parties have
taken appeals from the court's order. All
references to the court's opinion will be to the
appendix to the Jurisdictional Statement already
filed in this case by the City of Los Angeles.

JURISDICTION

On November 2, 1977, the district court
held unconstitutional Section 103(f)(2) of the Public
Works Employment Act of 1977, Pub. L. 95-28,
91 Stat. 116, 42 U.S.C. 6705(f)(2), and enjoined
the appellants from implementing the statute.
The opinion is reported at 441 F.Supp. 955.

On July 3, 1978, this Court vacated and
remanded the case to the district court for
consideration of mootness. ____ U.S. ____, 98 S.
Ct. 3133, 57 L.Ed.2d 1153.

On October 20, 1978, the district court
ruled that the case is not moot and reinstated its
earlier judgment dated November 2, 1977, Notice
of Appeal to this Court was filed on November 17,
1978 (App., *infra*). The jurisdiction of this
Court is invoked under 28 U.S.C. 1252.

2.

QUESTIONS PRESENTED

Whether Section 103(f)(2) of the Public Works Employment Act of 1977 and the regulations issued pursuant to the statute are valid under the Fifth Amendment and are consistent with Title VI of the Civil Rights Act of 1964.

Whether this action is moot.

STATUTE INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, 42 U.S.C. 6705(f)(2) provides:

Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding

sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

STATEMENT

In the summer of 1976, Congress enacted legislation designed to alleviate national unemployment and to stimulate the economy by distributing two billion dollars to state and local governments for public works projects. The legislation, entitled the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999, charged the Secretary of Commerce with the responsibility of dispensing the funds through the Economic Development Administration. In May 1977 Congress amended the 1976 Act by authorizing an additional four billion dollars for similar projects.

The new statute, entitled the Public Works Employment Act of 1977, made various changes in the 1976 Act, including the addition of Section 103(f)(2), quoted above.

The Secretary of Commerce subsequently issued regulations and guidelines to implement Section 103(f)(2). In pertinent part, the regulations provide (13 C.F.R. 317.19(b), 42 Fed. Reg. 27434):

(1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.

(2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

The Economic Development Administration notified the County on June 14, 1977, that it was eligible for an allocation under the Act to fund public works projects. The County authorized the submission of a list of public works projects totaling \$28,109,085. Based upon these applications, the Economic Development Administration sent an approval and award of grant to the County for each of its seventeen projects. The approvals were received at various times. The first such approval was dated August 22, 1977, and all of the approvals were dated on or before September 30, 1977. The grants were accepted on behalf of the County by execution of the forms and certificates which were requested by the Economic Development Administration.

Thereafter, on October 5, 1977, appellees, various contractors and associations representing contractors, subcontractors and suppliers in the California construction industry, filed this action in the district court seeking declaratory and injunctive relief. Specifically, appellees sought to bar the Secretary of Commerce and the defendant political subdivisions of the City and County of Los Angeles from enforcing Section 103(f)(2) in the 65 grants approved by the Secretary for the Los Angeles area.

On November 2, 1977, the district court granted appellees' motion for summary judgment, holding Section 103(f)(2) and the Secretary's regulations unconstitutional. The court also held the statute and the regulations invalid and illegal for inconsistency with Title VI of the Civil Rights Act of 1964. As to constitutionality, the court held that the Act violated the Due Process Clause of the Fifth Amendment because it established a racial quota and did not advance a governmental interest unrelated to race. The Act was not properly remedial in nature, the court concluded, because, in the court's view, there was insufficient evidence of discrimination before Congress when it enacted Section 103(f)(2), and no such evidence had been presented in the hearing on the merits. The court further concluded that underemployed minorities in the construction industry could be aided by racially neutral legislation having a less detrimental impact on non-minority contractors. The court enjoined future enforcement of Section 103(f)(2) and the Secretary's regulations, but it stated that its order does not apply to funds previously granted by the Secretary or to any action

taken by any of the defendants with respect to those funds. 441 F.Supp. 955.

Since the district court's ruling did not affect the monies already granted, specifications for each of the County projects were approved by the County and notices inviting bids were also published. Contracts were awarded for all but one of appellants' projects.

For one project which has a phased construction schedule, approval of the specifications and the advertisement for bids on the final phase are planned for the month of February 1979. That phased project involves the general development at Charmlee County Park.

Construction activities have commenced pursuant to each of the awarded contracts and several of the projects are near completion.

The district court's order was appealed to this Court where it was vacated and remanded to the district court for consideration of mootness. ___ U.S. ___, 98 S.Ct. 3133, 57 L.Ed.2d 1153.

On October 20, 1978, the district court ruled that the case is not moot and ordered that its judgment reported at 441 F.Supp. 955 be reinstated in full. The district court found that the case is not moot because the allegedly wrongful conduct of the appellants can reasonably be expected to recur yet evade appellate review.

THE QUESTIONS SUBMITTED ARE SUBSTANTIAL

All of the monies which were to be allocated under the statute have been allocated and the local appellants have proceeded to award contracts for the public works projects. Thus, there is no controversy within the scope of the district court's order of November 2, 1977, which enjoined enforcement of the minority business enterprise provisions with regard to any grant made after that date. Accordingly, since the district court's order enjoins nothing which the appellants are empowered to do the case is moot and should be dismissed because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971); White v. Regester, 422 U.S. 935 (1974).

It is speculative whether or not Congress will pass additional public works legislation and, if so, what provisions it will include for minority business enterprises. "[W]hen the chance of repetition is remote and speculative there is no jurisdiction (citations omitted). . . . 'The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.' United States v. W. T. Grant Co., 345 U.S. 629 (1953)." Williams v. Alioto, 549 F.2d 136, 142 (9th Cir. 1977).

A decision based upon the premise that Congress may in the future authorize and appropriate

additional funds would constitute an impermissible advisory opinion from the judiciary to the legislature. Preise v. Newkirk, 422 U.S. 395, 401 (1975).

On the merits, the case presents substantial constitutional questions under the Fifth, Thirteenth and Fourteenth Amendments, in addition to the statutory question of the compatibility of the statute with Title VI of the Civil Rights Act of 1964. Moreover, this case raises the question of Congress' authority to enact legislation designed to remedy forms of past discrimination.

CONCLUSION

For reasons stated above, it is respectfully submitted that the questions presented are substantial and of great public importance. It is submitted that this Court should note probable jurisdiction and set the matter for argument.

Respectfully submitted,

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CONTROL DISTRICT;
LOS ANGELES COUNTY BOARD
OF SUPERVISORS; LOS ANGELES
COUNTY ENGINEER; FACILITIES
DEPARTMENT OF LOS ANGELES
COUNTY

APPENDIX

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Court
Central Dist. of Calif.

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COUNTY OF LOS ANGELES AND
LOS ANGELES COUNTY FLOOD
CONTROL DISTRICT.

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OF CALIFORNIA

ASSOCIATED GENERAL CONTRACTORS
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a corporation; FORDON H. BALL, INC., a
corporation; STODDARD ENTERPRISES, a
sole proprietorship; and GRANITE
CONSTRUCTION COMPANY, a corporation,
Plaintiffs,

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11.

SECRETARY OF COMMERCE OF THE)
UNITED STATES DEPARTMENT OF)
COMMERCE; U.S. DEPARTMENT OF)
COMMERCE; LOS ANGELES COUNTY,)
a body corporate and politic; LOS ANGELES)
COUNTY BOARD OF SUPERVISORS;)
LOS ANGELES FLOOD CONTROL DISTRICT;)
LOS ANGELES COUNTY ENGINEER;)
FACILITIES DEPARTMENT OF LOS ANGELES)
COUNTY; CITY OF LOS ANGELES, a municipal)
corporation; LOS ANGELES CITY COUNCIL;)
DEPARTMENT OF RECREATION AND PARKS)
OF THE CITY OF LOS ANGELES; DEPART-)
MENT OF PUBLIC WORKS OF THE CITY)
OF LOS ANGELES,)
Defendants.)

Civil Action
No. 77-3738-AAH

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES.

NOTICE IS HEREBY GIVEN that Los Angeles
County, a body corporate and politic, Los Angeles
County Board of Supervisors, Los Angeles County
Flood Control District, Los Angeles County
Engineer and Facilities Department of Los Angeles
County, defendants in the above named action,
hereby appeal to the Supreme Court of the United States
from the memorandum opinion and order entered in
the docket on October 20, 1978, to the extent that
they declared and determined that the case, cause

12.

and issues in the above-named case are not moot, to the extent that they reinstated in full the summary judgment for declaratory and injunctive relief entered in this action on November 2, 1977, see 441 F.Supp. 955, 1044 (C.D. Cal. 1977), and further to the extent that they declared and determined that Section 103(f)(2) of Public Law 95-28, 42 U.S.C. 6705(f)(2) and the rules and regulations issued thereunder and relating thereto are unconstitutional.

This appeal is taken pursuant to 28 U.S.C. Section 1252.

DATED: November 17, 1978.

JOHN H. LARSON, County Counsel
GERALD F. CRUMP, Division Chief
Public Works Division
CHARLES J. MOORE, Deputy County
Counsel

By /s/ G. F. Crump
GERALD F. CRUMP, Division
Chief
Public Works Division